Overstreet, Greg (ATG)

From: Stiffarm, Denise (SEA) [denises@prestongates.com]
Sent: Thursday, January 12, 2006 1:32 PM
To: Overstreet, Greg (ATG)
Subject: Comments re Proposed Model Rules on Public Records

Mr. Overstreet: Attached please find the comments of the King County School Coalition and the Pierce County School Coalition regarding the Proposed Model Rules on Public Records. These comments were also submitted to the AGO website address, but I have attached the actual letter to this email as it is easier to read.

We appreciate the opportunity to provide these comments. Thank you. Denise Stiffarm

<<Proposed PRA Guidelines.pdf>>

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King County School Coalition

Everett, Federal Way, Issaquah, Kent, Lake Washington, Northshore, Riverview, Snoqualmie Valley, and Tahoma School Districts

Pierce County School Coalition

Bethel, Franklin Pierce, Orting, Puyallup, and White River School Districts

January 12, 2006

VIA EMAIL; ORIGINAL TO BE MAILED
www.atg.wa.gov/records/modelrules

Greg Overstreet
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Olympia, WA 98504-0100

Re: Proposed Model Rules on Public Records

Dear Mr. Overstreet:

On behalf of the King County School Coalition and the Pierce County School Coalition (referred to collectively herein as the "Coalition"), thank you for the opportunity to comment on the Attorney General's Office Proposed Model Rules on Public Records (the "Proposed Model Rules"). The Coalition offers the following comments regarding the Proposed Model Rules.

As a general note, although the Coalition recognizes that the Proposed Model Rules are intended to be "advisory only and [not binding on] any agency," the Proposed Model Rules will in fact establish public expectations for agency compliance with the Act and may be offered as persuasive authority in litigation. As such, the Coalition's comments in large part reflect concerns where the Proposed Model Rules appear to extend beyond the requirements of RCW 42.17.251 through 42.17.348 (the "Public Records Act" or the "Act"). Other comments request clarification regarding the intended meaning of a proposed rule.

- ***The Proposed Model Rules inappropriately suggest that agencies should, at times, create new or customized records:***

As the Proposed Model Rules properly recognize, it is a fundamental precept of the Act that an agency is not required to create a new record when responding to a public records request. *See* RCW 42.17.270; *see also* Proposed WAC 44-14-04003(4) and Proposed WAC 44-14-050(3)(a). Despite this recognition, in several places, the Proposed Model Rules establish an expectation that agencies will and should, in fact, create new and custom documents in certain circumstances. Specifically, Proposed WAC 44-14-04003(4) states that "sometimes it is easier for an agency to create a record than find itself in a controversy about whether the request requires the creation of a new record." *See also* Proposed WAC 44-14-05002(1) ("it is sometimes easier for an agency to create a record than to dispute the merits of a given request."). Similarly, Proposed WAC 44-14-050(3)(b) provides that "the agency may, in providing assistance to the requestor, choose to reformat or otherwise customize existing electronic records in a data base in order to respond to the information request." Proposed WAC 44-14-050(3)(c) goes further to delineate "factors" to guide the determination of whether an agency should create a customized database in response to a records request. Finally, Proposed WAC 44-14-05002(2) establishes a subjective standard that "it would be reasonable for an agency to consider customized access, but only if doing so would be relatively easy to accomplish . . . . The burden on the agency is the primary factor that should be used to determine whether an agency should provide customized access."

These provisions, separately and together, fundamentally alter the Act and could create a public expectation that agencies will, at times, create tailored records in response to a disclosure request. Requestors are likely to use these provisions to demand the creation, reformatting or other customization of existing electronic records. Indeed, the list of factors in Proposed WAC 44-14-050(3)(c) and the statement in Proposed WAC 44-14-050(3)(d) that "[t]he agency may limit the number of customized access requests an individual may make per year, or the number of programming hours it will devote to a request," provide support for potential arguments by claimants that the listed factors do not support an agency's refusal to format or customize records or that the agency is improperly limiting the scope as well as number of customized access requests. These statements invite litigation about whether it would have been "relatively easy" or not a significant burden on the agency to provide customized access. Such litigation is unnecessary given that the Act does not require the creation of new or customized records at all.

On a related note, Proposed WAC 44-14-05002(2) conflicts with Proposed WAC 44-14-050(3)(e). Proposed WAC 44-14-05002(2) provides that "**[i]f the *agency* decides** to provide customized access, the requestor must pay the agency's costs . . . ." Proposed Model Rules WAC 44-14-050(3)(e) (emphasis added) provides that "**[i]f the *public records officer and the requestor agree*** that customized access is a reasonable means of providing access to the information requested . . . then, pursuant to RCW 43.105.280, the public records officer may charge the requestor for the cost of such access . . . ." These two provisions create confusion

regarding exactly who decides whether customized access should be provided – whether it is an agency decision or a decision made by agreement between the public records officer and the requestor. Furthermore, Proposed WAC 44-14-050(3)(e) purports to remove the sole discretion that an agency holds with regard to the decision of whether it makes sense to create a customized record and instead makes the decision subject to negotiation.

For these reasons, the Coalition requests that any language suggesting that agencies create a new or custom record, including those references in Proposed WAC 44-14-04003(4), WAC 44-14-050(3)(b)-(e), WAC 44-14-05001 and WAC 44-14-05002, be omitted from the final rule.

- ***The Model Rules should recognize that agency employee training may be limited in some instances:***

We appreciate that the Proposed Model Rules recognize a distinction for purposes of necessary training between all agency employees and public records officers. *See* Proposed WAC 44-14-00005 ("public records officers should receive more intensive training"). This provision appropriately recognizes that some agency employees may not need to be trained to the same level as other employees. The Coalition requests that this provision be further expanded to recognize that certain categories of employees, particularly those who do not have any document creation or retention responsibilities, may not need public records training.

Specifically, the statement in Proposed WAC 44-14-00005 that "**[a]ll** agency employees should receive basic training on public records compliance and records retention" goes beyond the requirements of the Act and is unnecessary. The Act does not require that all agency employees be trained. Because employees of state and local agencies have widely varying job responsibilities (some of which may not include any kind of document creation or retention), training of all employees is unnecessary. This is of particular concern to the Coalition, whose member districts employ a wide and distinct number of employees. (For example school district employees include, without limitation, cafeteria servers, bus drivers, janitorial staff, maintenance staff, administrative and support staff, classroom aides, and teachers.) Training of all school district employees, where not necessary for compliance with the Act, would be a burden on limited agency resources.

Furthermore, other portions of the Proposed Model Rules provide an appropriate means for communicating the Act's requirements to employees and ensuring agency compliance. Specifically, Proposed WAC 44-14-03005 outlines record retention requirements that are applicable throughout an agency. Proposed WAC 44-14-03001(3) sets forth guidance regarding agency records created or used on non-agency computers and appropriately directs agencies to instruct employees that all public records should eventually be stored on agency computers. Provisions such as these ensure that agency practices comply with the Act even in those cases where employees do not receive direct training.

- ***The Model Rules should not encourage verbal public records requests:***

The Coalition agrees with the assessment in Proposed Model Rules WAC 44-14-03006 that verbal public records requests are "problematic." Indeed, verbal public records requests expand the practical and accepted definition of a proper public records request. *See* WAC 44-06-080 ("a request shall be made in writing"). As such, it is particularly troubling that the Proposed Model Rules, as a best practices document, even provide for verbal requests as a means for making a public records request. The language in Proposed WAC 44-14-03006 relating to verbal requests creates a range of concerning issues. First, the language establishes a new burden on agency staff to "immediately reduce [the request] to writing and then verify in writing with the requestor that it correctly memorializes the request." In effect, this provision illogically shifts the responsibility for making a proper request from the requestor to the agency. Not only does this provision create a new duty outside of the Act, it further compromises limited agency resources. In addition, the provision makes it possible for an individual to claim that he or she made a public records request despite having no proof of any such request. This is particularly troubling given that the claim of an unfulfilled verbal request could create a basis for suit against an agency. Finally, the provision creates circumstances wherein a verbal public record request might be directed to an inappropriate agency employee or to multiple agency employees who are unaware that other employees are working on the same request. This is particularly relevant for an agency like a school district, which has a wide range of employees with varying responsibilities and functions and who are located in a number of different locations. Thus, the Coalition requests that the final rule specify, consistent with WAC 44-06-080, that verbal requests are inappropriate and that requests should be made in writing.

- ***An agency should be held to a standard of diligence, rather than impossibility, for obtaining and producing records that it does not possess:***

Proposed WAC 44-14-03001(3) states that an "agency would be responsible for obtaining [a public record it has used but that is held by a third party], unless doing so would be ***impossible.***" The Coalition believes that impossibility is an unnecessarily high bar. Indeed, the Proposed Model Rules do not set a similarly high bar for public records that the agency actually possesses. *See* Proposed WAC 44-14-040(9) ("the public records officer shall close the request and indicate to the requestor that the (agency) has completed a ***diligent search*** for the requested records.") The Coalition suggests that, consistent with the goal of preserving agency resources and the requirement that an agency perform a diligent search for records it possesses, the Proposed Model Rules should require that an agency make a ***diligent effort*** to obtain records it has used but does not itself possess.

- ***The Model Rules should clarify the intent regarding processing of subsequent and abandoned requests:***

Proposed WAC 44-14-040(6)(b) states that: "[i]f a requestor or a representative of the requestor fails to make arrangements to claim or review the records within the thirty-day period, the agency may close the request and refile the assembled records. A subsequent request for the same or almost identical records ***can be processed last.***" Similarly, Proposed WAC 44-14-04005(1) provides that an agency may refile records when a party fails to claim or review the records within the thirty-day notification period, and that the agency can "process the second request [by the same party] for the now-returned records last." The Coalition requests clarification of what may be done in accordance with the option that the subsequent request be "processed last." The Coalition assumes that this means that a subsequent request may be processed as a new request; that is, in the order received with other requests and without dating back to the first request.

- ***The Model Rules should clarify that an agency shall be presumed to have "properly obtained' additional time to fulfill a request by providing a reasonable extension estimate to the requesting party:***

Proposed WAC 44-14-04003(9) states that "[u]nless the agency ***properly obtains*** additional time to fulfill the request, the agency is obligated to provide the record within the reasonable estimate period." Taken alone, "properly obtains" is a vague and subjective concept, the use of which might invite litigation. The Coalition requests either: (1) clarification that an extension is "properly obtained" when an agency provides a reasonable estimate and explanation for the extension; or (2) that the provision be removed from the final rule. Without this clarification, the Proposed Model Rules inappropriately extend the Act to authorize a requestor to reject an agency's reasonable extended time estimate.

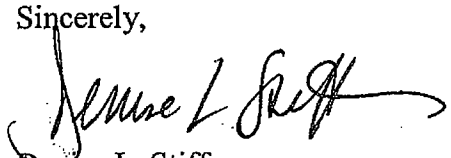
- ***The Model Rules should recognize that the disclosure of the "to" and "from" lines in attorney-client communications can be made without disclosing an actual document:***

Proposed WAC 44-14-05004(4)(b)(i) recognizes that the body of a memorandum containing attorney-client privileged information can be redacted but that "the 'to' and 'from' information is not typically exempt and generally should be disclosed." This provision creates a scenario where an agency would be required to produce a document that is fully redacted except for the "to" and "from" lines. However, because agencies are required to prove the appropriateness of their redactions, this requirement is unnecessary and should be omitted from the final rule. For example, the agency must "provide enough information [about withheld records] for a requestor to make a threshold determination of whether the claimed exemption is proper." RCW 42.17.310(4); *see also* Proposed WAC 44-14-05004(4)(b)(ii). Additionally, "[o]ne way to properly provide a brief explanation of the withheld record or redaction is for the

agency to provide a withholding index. It identifies the type of record, its date and number of pages, and ***the author or recipient of the record (unless their identity is exempt)***." Proposed WAC 44-14-05004(4)(b)(ii). It would be redundant and wasteful to require an agency to disclose documents that are fully redacted except for the "to" and "from" lines, particularly when the agency elects to provide a withholding index, including the author and recipient of the record. The Coalition requests that this provision be clarified to recognize that such a document would not need to be disclosed where it is otherwise appropriately identified as an exempt document consistent with Proposed WAC 44-14-05004(4)(b)(ii).

The Coalition appreciates this opportunity to comment on the Proposed Model Rules. The Coalition looks forward to working cooperatively with the AGO to identify revisions to the Proposed Model Rules that are consistent with this goal. If you have any questions regarding the Coalition's comments, please call me at (206) 623-7580. Thank you.

Sincerely,



Denise L. Stiffarm
Legal Counsel

cc: Members, King County School Coalition
Members, Pierce County School Coalition

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